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No. 93-644

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO. INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. CONTRARY TO HONDA'S ASSERTION, "EMPIRICAL DATA" DOES NOT DEMONSTRATE THAT JUDICIAL POST-VERDICT, WEIGHT-OF-THE-EVIDENCE EXCESSIVENESS REVIEW IS NEEDED IN OREGON TO CONTROL PUNITIVE DAMAGES AWARDS. 4

II. CONTRARY TO HONDA'S CLAIMS, AND THOSE OF SOME OF ITS *AMICI*, THERE IS NO *NATIONWIDE* PUNITIVE DAMAGES CRISIS 11

III. JURIES CAN BE TRUSTED TO MAKE COMPETENT, FAIR, AND UNBIASED DECISIONS. 19

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Big B., Inc. v. Cootingham, 1993 WL 341132 (Ala. 1993) . 7

Burke v. Deere & Co., 6 F.3d 497 (1993) (Heaney, J., dissenting) 9

Dunn v. Hovic, 1 F.3d 1371 (3rd Cir. 1993) (*en banc*) . . . 9

GAO, *Product Liability: Verdicts and Case Resolutions in Five States*, GAO/HRD-89-99 (Sept. 1989) 15

General Motors Corp. v. Johnston, 592 So.2d 1054 (Ala. 1992) 7

Hafner v. Brown, 983 F.2d 570 (4th Cir. 1992) 5

Herald v. Hood, 1993 Ohio App. LEXIS 3688 (Ohio Ct. App. 1993) 7

Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) 4

Loughman v. Consol-Pennsylvania Coal, Co., 6 F.3d 88 (3d Cir. 1993) 5

Peterson, Mark, Syam Sharma, and Michael Shanley, *Punitive Damages: Empirical Findings*, RAND-Institute for Civil Justice Report, R-3311-ICJ (1987) 12

Ross v. Black & Decker, 977 F.2d 1178 (7th Cir. 1992) . . 7

Silkwood v. Kerr-McGee Corp., 769 F.2d 1451 (1985), *cert. denied*, 476 U.S. 1104 (1986) 6

Simerly v. Edwards, 1992 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1993) 7

Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808 (8th Cir. 1992) 6

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MISCELLANEOUS

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24

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INTEREST OF *AMICUS CURIAE*

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety, and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that victims are compensated for their injuries and that wrongdoers are punished for their misconduct. Punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of the respondent in this case.[1]

SUMMARY OF ARGUMENT

In addition to advancing legal and historical arguments that procedural due process mandates weight-of-evidence review in every case and state, Honda and its *amici* go to considerable lengths to "empirically" prove that such a review is essential to control runaway jury verdicts. We are filing this brief *amicus curiae* to address those "empirical" arguments.

The "empirical" arguments proffered by Honda and its *amici* are used to advance three claims: *(a)* that, outside of Oregon, weight-of-the-evidence excessiveness review is both "routinely" available and remarkably effective; *(b)* that this panacea needs to be prescribed *in Oregon* because of the assertedly ever-worsening *national* crisis of skyrocketing punitive damages awards; and *(c)* that defendants need this type of judicial review because lay jurors are incompetent, or biased, or

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[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

both, and because there is no other procedural device that is capable of constraining the passions and prejudices of capricious juries.

We demonstrate below that the "empirical" arguments provided in support of these claims are empirical in name only, as they are based on questionable pseudo-scientific myths rather than documented scientific facts. In brief, there are four reasons why.

FIRST, Honda's own unvalidated study of remittitur practice, which was devised solely for argument in this Court, is too flawed to yield useful data and worthwhile inferences -- flawed by the fact that the two-year period picked by Honda for its compilation of "sample" data is both too short and too recent to generate serviceable data; flawed by the fact that Honda has misread and mischaracterized a significant proportion of the cases that it found in its "sample;" and flawed by the fact that the inferences drawn by Honda from the "data" found in its "sample" are based on an unstated, unexamined, and unsuitable premise -- that, because some states have found weight-of-the-evidence excessiveness review to be helpful, all states are constitutionally required to have it.

SECOND, in contrast to Honda's unvalidated study, the data compiled in a well-validated 25-year empirical study of punitive damages awarded in the United States in products liability cases -- cases like the one at bar -- show that Oregon has no need for the procedural reform that Honda insists it must have. That study, which has been widely extolled by commentators and has been cited as authority by a number of courts, and which even Honda lauds as authentic, establishes that: *(a)* punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the instant case); *(b)* the size of the mean punitive damages award in Oregon is less than one-half the national mean; *(c)* although during the 25-year period covered an average of 1.16% of the nation's population lived in Oregon, Oregon juries awarded less than one-quarter of that percentage in punitive damages during that time period; *(d)* of the 44 other states that allow punitive damages awards, Oregon ranks in the bottom half in both total awards and per capita awards; and *(e)* the amount of punitive

damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide.

In sum, this validated data, far from showing that judicial post-verdict weight-of-the-evidence excessiveness review provides more protection than Oregon's structure of pre-verdict and post-verdict protections, demonstrate that the Oregon regime produces better results for defendants. For this reason, Oregon should not be compelled to conform to the procedures observed in other states in order to "protect" defendants.

THIRD, contrary to the "facts" variously proclaimed by Honda and its *amici* about a national epidemic of skyrocketing punitive damages awards, ***"every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?"* 140 U. Pa. L. Rev. 1147, 1254 (1992).

FOURTH, contrary to Honda's claim that "[t]he empirical evidence is overwhelming that juries often" are inept, irrational, and/or biased, Pet. Br. at 10, the most recent and most reliable studies of jury performance demonstrate that: *(a)* jurors serve conscientiously and proficiently; *(b)* they perform as well, if not better, than judges in finding facts and setting awards; and *(c)* jurors in tort cases are biased, if at all, against plaintiffs and in favor of defendants, particularly corporate defendants. Thus, ***"aggregate empirical evidence drawn from multiple sources lends no support to claims that juries are consistently pro-plaintiff, incompetent, or deliver unjustifiably generous awards."*** Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, Judicature (Oct-Nov. 1992) 118, 124.

Each of these points is discussed in detail below.

ARGUMENT

I. CONTRARY TO HONDA'S ASSERTION, "EMPIRICAL DATA" DOES NOT DEMONSTRATE THAT JUDICIAL POST-VERDICT, WEIGHT-OF-THE-EVIDENCE EXCESSIVENESS REVIEW IS NEEDED IN OREGON TO CONTROL PUNITIVE DAMAGES AWARDS.

Honda says that "[c]ommon sense . . . suggests that jurors will make errors in setting damages awards." Pet. Br. at 26. Honda further asserts that common sense is confirmed by "empirical data." *Id.* Thus, Honda boasts that it "has reviewed all reported cases, state and federal," 271 in total, "in which punitive damages were contested as excessive during 1992 and 1993," *id.* at 27 (footnote omitted), and that the "empirical data" extracted from this review "demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries." *Id.* at 26. Honda additionally asserts that "it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous." *Id.* at 29. Finally, Honda concludes that the procedural remedy that has proved so serviceable in other states – remittitur – is "no less necessary in Oregon." *Id.* at 30.

Honda's "common sense" argument, and the "empirical data" amassed in support of that argument, are flawed in three major respects.

First, although Honda says that its "empirical data" proves that untrained jurors are prone to error and cannot be trusted with verdicts, all that that data really shows is that Honda's highly-trained lawyers are prone to error and cannot be trusted with computers. Even a cursory review of the 61 federal cases listed in Appendices A and B of Petitioners' Brief reveals that Honda has completely misread, misportrayed, and miscategorized at least 13 of those cases (21.3%). And Honda's errors are not trivial ones.

For example, Honda asserts that the "punitive damages" awarded in *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992), "were held not excessive." Pet. Br. at 5a. Although the Second

Circuit's opinion actually contained the words "excessive" and "punitive" – trigger words that Honda used in its computerized database search for cases (*see* Pet. Br. at 27 n. 19, describing the methods Honda used "[t]o construct our sample") – those trigger words obviously were used by the parties and the court in ways that Honda did not quite expect.

Thus, *Hygh* involved an appeal by a police officer who had been held liable for civil rights violations under 42 U.S.C. § 1983 for *"excessive use of force"* against a civilian. 961 F.2d at 361. The issues on appeal concerned a large *compensatory damage* award, and had nothing to do with the minuscule punitive damages that had been awarded in that case. Only the $281,000 compensatory damages award was challenged as being against the weight of the evidence, not the $1,000 punitive damages award.

Honda made a similar error with regard to *Hafner v. Brown*, 983 F.2d 570 (4th Cir. 1992). As was the case with its classification of *Hygh*, Honda says the "punitive damages" awarded in *Hafner* "were held not excessive." Pet. Br. at 5a. Once again, however, excessiveness entered the picture not as an asserted ground for remittitur or appeal, but as the basis for liability; in *Hafner*, as in *Hygh*, police officers were sued under 42 U.S.C. § 1983 for *excessive use of force*. And, in *Hafner*, as in *Hygh*, the size of the punitive damages award was not at issue; instead, the appellants asserted that the trial judge had committed error in providing supplemental instructions to the jury in the midst of its deliberations. 983 F.2d at 574-75.

Honda got a little closer to the mark in *Loughman v. Consol-Pennsylvania Coal, Co.*, 6 F.3d 88 (3d Cir. 1993), but not much. At least, *Loughman* involved punitive damages. Still, nothing relating to the size of that award entered into the court's consideration of that case. Instead, the punitive damages question at issue revolved around the *plaintiffs' "contenf tion]* that the district court erred in refusing to assess punitive damages jointly and severally among the defendants." 6 F.3d at 100 (emphasis added).

Honda stumbled yet again in its attempt to pigeon-hole *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808 (8th Cir.

1992). According to Honda, that case also implicated a challenge to jury excessiveness. In fact, however, the relevant issue on appeal was whether the evidence submitted to the jury was sufficient to support *any* award of punitive damages. As the Eighth Circuit carefully and clearly explained, ***defendant "concedes that the essential basis of its trial objection and post-trial motion for remittitur was that the issue of punitive damages should not have been presented to the jury, not that the jury's award was excessive assuming punitive damages were justified."*** 962 F.2d at 815 (emphasis added). It appears that Honda did not read this case, the cases listed above, and many other cases in its sample with great care.[2]

To be sure, an occassional oversight or an infrequent inaccuracy is hardly cause for concern. But the mistakes made by Honda are neither few nor inconsequential. For this reason, whatever else might be said about Honda's "empirical data," these errors contaminate Honda's evidence and thereby render suspect Honda's entire "study."

Second, Honda's methodologies are as flawed as its characterizations of so many cases. Honda's most glaring and most fundamental methodological mistake lies in the short two-year time-period selected for study. Without a longer time-span, the ultimate resolution of the cases Honda cites is unknown and unknowable. For example, it cannot be determined whether remitted awards are upheld on appeal or not.[3] In addition, a

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[2] *See* Appendix A hereto for other cases that were mistakenly characterized by Honda.

[3] Such a brief period cannot capture the complexity of judicial modification of jury awards. It is not uncommon for remitted awards to be reinstated, vacated or reversed entirely. For example, in *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (1985), *cert. denied*, 476 U.S. 1104 (1986), the punitive damages award was handed down by an Oklahoma jury in 1979, reversed by the 10th Circuit, and remanded to the appeals court by the U.S. Supreme Court in 1984. In 1985, the Tenth Circuit reversed and remanded the punitive damages award. The case was finally settled in 1986, shortly after the Court denied a petition for writ of *certiorari*. If Honda's single-point-in-time examination had been applied to *Silkwood*, any number of false

single-point-in-time analysis is particularly vulnerable to distortion if the period examined has been deliberately chosen to make a partisan point. In this case, whatever Honda's motive, its focus on the past years undeniably skewed its results: the instant case was decided by the Oregon Supreme Court in 1993, and 1992 was the year that the Ninth Circuit upheld *Ingram v. Acands, Inc., supra* – the only other products liability case in the last 28 years in which punitive damages were awarded in a case involving Oregon law. In contrast to Honda's two-year "snapshot," each of the five major empirical studies of punitive damages covered longer periods of time. *See* Section II, *infra* (discussing the periods surveyed and findings made in these five studies). Finally, Honda's sample, and thus its study, is flawed in yet another respect because the sample, small as it is, consists of a grab-bag of cases, completely undifferentiated as to the type of action involved.[4]

Third, and most importantly, even if the cases in Honda's sample represented what Honda says they do, and even if the validity of Honda's study was not vitiated by its

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conclusions could have been drawn as to whether error was made and as to who committed the error.

[4] By mingling the instant case and two other products liability actions in which punitive damages awards were reduced as excessive (*Ross v. Black & Decker*, 977 F.2d 1178 (7th Cir. 1992) and *General Motors Corp. v. Johnston*, 592 So.2d 1054 (Ala. 1992)) with such disparate cases as those involving a customer's claims of sexual assault and battery and false imprisonment against a restaurant chain, *Big B., Inc. v. Cottingham*, 1993 WL 341132 (Ala. 1993), a niece's claim of sexual abuse against an uncle, *Herald v. Hood*, 1993 Ohio App. LEXIS 3688 (Ohio Ct. App. 1993), and a claim of trespass by one neighbor against another for cutting down trees without permission, *Simerly v. Edwards*, 1992 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1993), Honda mixes not only apples and oranges but every other item in the food chain. Some types of cases might enkindle more passion and prejudice; other types might ignite less. For present purposes, however, the key word is the conjectural "might." In the absence of a careful analysis of these cases, and others drawn from a larger universe and a longer period of time, it is impossible to ascribe any meaning to, or repose any confidence in, the data teased from these cases by Honda.

numerous methodological mistakes, Honda's data still would not prove its conclusion. Thus, the most fundamental flaw in Honda's argument is not a factual or methodological one, but a logical one: the assertion that because a certain procedure is available by popular choice in most states, it should be made available by constitutional fiat in every other state.

In Honda's syllogism, the unstated and unexamined premise is that because some states have determined that remittiturs are useful, remittiturs must be necessary in every state, specifically in the State of Oregon, and that, therefore, remittiturs should be required to be provided nationwide. Thus, Honda insists that this Court should transform what is a jurisprudential policy preference in some states into a constitutionally compelled requirement in every state.

Honda's effort to bolster its reasoning with "empirical" data -- "we have statistics that prove that everybody's doing it" -- adds nothing to the merit of its argument. Most pertinently, Honda never bothers to ask whether Oregon has a problem with jury awards of punitive damages: whether, for example, Oregon juries award punitive damages too frequently; or routinely make awards that are excessive in size; or commonly render punitive damages in amounts that are way outside the mainstream of awards rendered in other states.

Because Honda never asks the right questions, its "empirical data" is useless in providing the right answers. Nevertheless, there is one empirical study that readily lends itself to the essential inter-state comparisons: Michael Rustad and Thomas Koenig, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) ("Rustad-Koenig Study"). Professors Rustad[5] and Koenig examined data regarding every products liability case filed anywhere in the United States during the 25-year period from 1965 through 1990 that resulted in a punitive damages award. *See* Rustad-Koenig Study, 78 Iowa L. Rev. at 32-36. Unlike Honda's study, which was prepared solely for argument in this Court, the Rustad-Koenig Study has been validated by the

[5] Prof. Rustad is co-counsel on this brief.

peer-review process and has been hailed as comprehensive and authoritative by courts and academic commentators alike.[6]

As reflected in the accompanying graphs, and in the underlying tables, that are attached hereto as Appendix B, the Rustad-Koenig Study yields a number of significant findings:

[6] The Rustad-Koenig research has been praised by many academics as consistent with other serious scholarly studies on the incidence and size of punitive damage awards in products liability cases. *See, e.g.*, Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System and Why Not?*, 140 U. Pa. L. Rev. 1147, 1259 (1992) (Rustad-Koenig study is the "most intensive examination of punitive damages in product liability cases"); Dean Teresa Schwartz, *Punitive Damages and Regulated Products*, 42 Am. U. L. Rev. 1335,1348, 1352 (1993) (citing findings on medical products cases with approval); Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U.L. Rev. 1393, 1409 (1993) ("Rustad and Koenig study was exhaustive search for punitive damage awards in product liability cases in both state and federal courts"); Jerry Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 San Diego L. Rev. 241, 248 (1993) (concluding that Rustad study consistent with other empirical research); Kenneth Abraham, Robert Rabin, & Paul Weiler, *Enterprise Liability for Personal Injury: Further Reflections*, 30 San Diego L. Rev. 333, 344 (1993) (Reporters for ALI Project on Enterprise Liability citing Rustad-Koenig Study for proposition that "punitive damage awards are an exceptional event.").

Several courts have also cited the Rustad-Koenig study as definitive. *See, e.g., Dunn v. Hovic*, 1 F.3d 1371, 1388 (3rd Cir. 1993) (*en banc*) ("exhaustive search" of punitive damages awards in products liability cases, with results consistent with other empirical studies); *Burke v. Deere & Co.*, 6 F.3d 497, 516 (1993) (Heaney, J., dissenting) (Rustad-Koenig Study "debunks" myth of "runaway juries," "skyrocketing awards," and "competitive disadvantage"). *See also Transportation Insurance Co. v. Carlos*, 1994 Tex. Lexis 23 (Tex. Feb. 2, 1994) (concurring and dissenting opinions citing Rustad-Koenig study).

(A) Punitive damages are rarely awarded in products liability actions in Oregon (only twice in 25 years, including the instant case).[7]

(B) The size of the average punitive damages award in Oregon is less than one-half the size than the national mean (only 46.12% of national mean).

(C) Although during the 25-year period covered an average of 1.16% of the nation's population lived in Oregon, juries in that state awarded less than one-quarter of that percentage in punitive damages during the 25 years surveyed, that is, only 0.27% of the total punitive damages awarded nationwide in products liability cases from 1965 through 1990 (less than one-quarter of the expected rate).

(D) Of the 45 states that allow punitive damages awards, Oregon ranks in the bottom one-half in both total awards (ranking 29th) and per capita awards (ranking 24th).

(E) The amount of punitive damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide ($1.47 per capita in Oregon for the 25-year period surveyed and only $0.06 per capita per year, compared to $6.36 per capita for the United States for the same 25-year period or $0.25 per capita per year nationwide).

Thus, contrary to Honda's claim that defendants in Oregon fare worse than defendants in states that provide for remittiturs, **defendants in Oregon actually fare *better* than defendants in most other states.** Put differently, data derived from the Rustad-Koenig Study make plain that Oregon's panoply

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[7] During the period from 1965 through 1990, punitive damages were awarded only twice in cases involving Oregon law: once in the instant case, and a second time in *Ingram v. Acands, Inc.*, 977 F. 2d 1332 (9th Cir. 1992). Moreover, punitive damages have not been awarded in a products liability trial in Oregon since 1990.

of procedural protections provides results superior (from the defendant's perspective) to those obtained through the remittitur practices afforded in other states. Thus, defendants in Oregon have no rational reason to covet the safeguards offered in other states. More importantly, there is no reason for this Court to impose a procedural requirement on Oregon that Oregon does not want and does not need.

II. CONTRARY TO HONDA'S CLAIMS, AND THOSE OF SOME OF ITS *AMICI*, THERE IS NO *NATIONWIDE* PUNITIVE DAMAGES CRISIS.

Unable empirically to establish that there is a crying need *in Oregon* for the procedural punitive damages "reform" they seek to have imposed on that state, Honda and a few of its *amici* nonetheless maintain that this Court should require such reform on the basis of a supposedly ever-worsening punitive damages crisis *throughout the rest of the nation*. Significantly, however, with the exception of two distorted renderings of a single 1987 study, Honda and its *amici* do not even attempt to build an empirical case in support of their claims. Rather, without providing any hard data, Honda beseeches the Court to provide post-verdict weight-of-the-evidence excessiveness review because "in today's litigation climate the *amount* of money involved can be staggering: the size of a [punitive] damages award is limited only by the jury's (or, as in this case, the plaintiff's) imagination, and seven-, eight-, and even nine-figure judgments are now common . . . ." Pet. Br. at 20 (footnote omitted; emphasis in the original). Similarly, the Brief *Amici Curiae* of the Products Liability Advisory Council, *et al.* ("PLAC Br.") insists that weight-of-the-evidence review is desperately needed because "commercial entities [in the United States] have suffered directly from the *surge of arbitrary, discriminatory, and excessive punitive damages judgments in recent years.*" PLAC Br. at 2 (emphasis added). In like fashion, the Brief *Amicus Curiae* of the Equal Employment Advisory Council ("EEAC Br.") complains that *"[p]unitive damages awards, particularly in the business context, are increasing by leaps and bounds."*

EEAC Br. at 15 (emphasis added). *See also* Brief *Amici Curiae* American Council of Life Insurance, *et al.* ("ACLI Br.") at 7; PLAC Br. at 18 n.2; and EEAC Br. at 11.

Tellingly, Honda and its *amici* have been able to find only a single empirical study to cite in support of their contention that there is an ever-worsening national punitive damages crisis: Mark Peterson, Syam Sharma, and Michael Shanley, *Punitive Damages: Empirical Findings*, RAND-Institute for Civil Justice Report, R-3311-ICJ (1987) ("RAND-ICJ Study").[8] This paucity of support is not surprising in view of the fact that ***"every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?"* 140 U. Pa. L. Rev. 1147, 1254 (1992).

What is worse, though, at least from the perspective of the petitioners' interests, is the fact that the RAND-ICJ study upon which Honda and its *amici* rely actually *undercuts* rather than supports petitioners' arguments. Thus, although the Equal Employment Advisory Council asserts that the "RAND[-ICJ] study . . . reported massive increases in the number and size of punitive damage awards in business and contract cases, including employment claims, between 1960 and 1984," EEAC Br. at 15, a review of the RAND-ICJ study reveals that it "reported" no such thing.

Indeed, the RAND-ICJ study began by noting that the debate regarding the putative punitive damages crisis has been infected by many such wishful and tendentious reports. Thus,

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[8] The American Council of Life Insurance additionally cites an obscure and decidedly non-empirical article, W. Volz & M. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992), for the proposition that "the trend toward larger punitive damages awards . . . 'appears to continue unabated.'" ACLI Br. at 7. No data is cited to support that assertion.

the RAND-ICJ researchers observed that, "as with many other civil justice issues, the debate [concerning punitive damages] has proceeded without much attention to facts." RAND-ICJ Study at i. Moreover, "despite the attention [punitive damages awards] have received, there has been little empirical analysis of their number, their size, or the conditions under which they occur." *Id.*, at v. The RAND-ICJ researchers set out to change that state of affairs, examining all civil jury trials in San Francisco County, California and Cook County (Chicago), Illinois from 1960 to 1984 and all civil jury trials in the state of California from 1980 to 1984. *Id.*

Far from depicting a crisis, the RAND-ICJ "analyses show that the incidence of punitive damages has been quite small throughout the 25-year period in Cook County (*on average, less than three such awards per year*) and in San Francisco County (*one per year*)." *Id.* at v (emphasis added). Furthermore, although *"[p]roduct liability cases have been of special concern to many critics, . . . our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984."* *Id.* (emphasis added). As re-analyzed by Judge Richard M. Posner and University of Chicago Law Professor William M. Landes, the RAND-ICJ data demonstrate that during the 25-year period studied: "only eight-tenths of 1 percent of all jury trials in San Francisco in products liability cases resulted in . . . an award [of punitive damages]; the corresponding figure for Cook County was only one-tenth of 1 percent." William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987), at 306-07.

Along the same lines, the RAND-ICJ analysts carefully noted that: "[i]n the 1980's in Cook County the number of punitive damage awards for personal injury cases barely increased, but the amount of money awarded rose sharply. After having awarded only $1.6 million (in 1984 dollars) during the previous twenty years, Cook County juries awarded $27 million during the early 1980's. *Most of the dollars were awarded in three cases with exceptionally large awards.*" RAND-ICJ Study at v-vi (footnote omitted; emphasis added). Similarly, "[i]n San

Francisco [County], the total amount of money awarded in punitive damages increased sharply in the late 1970's; between 1980 and 1984 the same amount was awarded as in the immediately preceding period, although the total number of personal injury trials dropped sharply." *Id.* at vi.

Although the RAND-ICJ researchers noted that the largest awards of punitive damages found in their 25-year survey were rendered during the tail-end of that survey, they nevertheless concluded that, overall, "*punitive damages were rarely awarded in personal injury litigation and when awarded were usually small.*" *Id.* at vi (emphasis added).

Once again, as Professor Saks has emphasized, the results of the RAND-ICJ study are consistent with the conclusions of "every [other] empirical study of the [punitive damages] question." Saks, *supra*, 140 U. Pa. L. Rev. at 1254. In particular, ***like the RAND-ICJ study, four other empirical studies have "reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."*** *Id.* (emphasis added).

These four studies are discussed below in chronological order.

1) LANDES AND POSNER STUDY (1987) – As the Court well knows, punitive damages have been the subject of controversy for at least a decade. "Because so much concern ha[d] been expressed about runaway juries imposing colossal punitive damage awards in products liability cases," Judge Posner and Prof. Landes "attempted to estimate the quantitative importance of such awards by examining all reported products liability cases in the federal courts of appeals from the beginning of 1982 through November 1984." Landes and Posner, *The Economic Structure of Tort Law*, *supra*, at 302.[9]

[9] Posner and Landes took pains to "note that the sample itself is likely to be unrepresentative of the universe of products liability cases – *but unrepresentative in a direction that tends to bias our estimate against the hypothesis we test, and reject: that punitive damages are being overused in modern products liability law.*" Landes and Posner, *supra*, at 302 (emphasis added). Thus, they explained that:

> [t]he economic theory of litigation predicts that cases most likely to be litigated and appealed will be those where the law is most uncertain and where damages largest. This suggests that *our sample will overstate the relative importance of punitive damages in products liability cases*; an award of punitive damages will increase the probability of an appeal.

Id., at 302-03 (footnote omitted; emphasis added).

Judge Posner and Prof. Landes subsequently enlarged their sample, but the addition of more data further validated rather than undercut their initial findings. Accordingly, they concluded that: "*[t]he insignificance of punitive damages in our samples is evidence that they are not being routinely awarded.* Out of a total of 359 cases in all of our samples, punitive damages were allowed in only seven – 2 percent." *Id.*, at 305-06 (emphasis added). Judge Posner and Prof. Landes further observed that, during the 1982-84 period, "*[t]he average award of punitive damages* in those seven cases *was less than $500,000, slightly more than the average actual damages* awarded in those cases." *Id.*, at 306 (emphasis added). Finally, their research led them to conclude that *punitive damages were "relatively insignifican[t]. . . ."* *Id.*, at 304.

2) GAO STUDY (1989) – The U.S. General Accounting Office ("GAO") analyzed the frequency and size of punitive damage awards by collecting and reviewing court records in all (305) products liability cases resolved through trial between 1983 and 1985 in five representative states – Arizona, Massachusetts, Missouri, North Dakota and South Carolina. GAO, *Product Liability: Verdicts and Case Resolutions in Five States*, GAO/HRD-89-99 (Sept. 1989) ("GAO Study"), at 2.

The GAO reached the same conclusions as did Judge Posner and Professor Landes and the RAND-ICJ researchers: that punitive damages were awarded infrequently (in only 23 of 305 cases –7.5%) and "were highly correlated (.71) [in size] with the compensatory damages [awarded]." *Id.*, at 3. For

example: "[t]he 23 punitive damage awards had an average just under $1.3 million and a median of $400,000, which are only slightly larger than the average and median compensatory awards in those 23 cases (average of $906,000 and median of $375,000.)" *Id.*, at 29.

3) AMERICAN BAR FOUNDATION STUDY (1990) -- Stephen Daniels and Joanne Martin, Senior Research Fellow and Associate Director, respectively, of the American Bar Foundation ("ABF"), examined 25,627 jury verdicts handed down in state trial courts from 1981 to 1985, a period deliberately selected for study because of the assertedly large numbers of excessive punitive damages awarded during the early 1980's. Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 28 (1990). Daniels and Martin drew data from state jury verdict reporters in 47 counties in 11 states. The sample was regionally balanced in areas of "varying population sizes and socio-economic make-ups." *Id.* at 29.

Like the researchers who published the three studies that preceded their own, Daniels and Martin found little empirical support for the notions that punitive damages were routinely awarded; that such damages were routinely awarded in large, let alone excessive, amounts; that the number of awards was rapidly increasing; that the size of awards was exponentially expanding; or that whatever problems may have existed on any score in any location were representative of a problem that was truly national in scope and did not represent a merely local anomaly.

Thus, for example, Daniels and Martin found that "punitive damages were awarded in only 34 of the 967 products liability cases evaluated." *Id.*, at 38. *See id.*, Table V. The ABF researchers identified a second major controversy in punitive damages as the "debate over the dollar value of punitive damage awards." *Id.* at 39. Daniels and Martin not only found that punitive damage awards were unusual, but also that they were relatively small in size. The median punitive damages award in jurisdictions having 10 or more punitive awards ranged from under $10,000 in some counties to $204,000 in San Diego. *Id.* at 42. Finally, Daniels and Martin confirmed the results

recorded by other researchers -- that punitive damages were not increasing rapidly in number or size, *see id.*, at 43-57, nor were they "out of proportion," let alone "grossly" or "excessively" so. *See id.*, at 57-62.

On the basis of these findings, Daniels and Martin concluded that, contrary to the claims made by various self-described "tort-reformers":

> ***punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that "boggle the mind."*** Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest. . . . ***The punitive damages system that emerges from this study is significantly different than the system described by the [tort] reformers, and does not provide evidence of a nationwide problem. Thus, one should view with skepticism the claims that juries routinely awarded punitive damages in large amounts, and that these developments were nationwide in scope.***

Id., at 43 (emphasis added).

4) RUSTAD-KOENIG STUDY (1992)[10] -- Profs. Rustad and Koenig examined data regarding every products liability case filed anywhere in the United States during the 25-year period from 1965 through 1990 that resulted in a punitive damages award. 78 Iowa L. Rev. at 32-36. Their findings included the following:

(A) Punitive Damages Were Rarely Awarded in Products Liability Cases -- Profs. Rustad and Koenig report that, "[w]ith the exception of asbestos litigation, punitive damage awards in products liability are actually decreasing since the mid-1980s." 78 Iowa L. Rev. at 36. Indeed, of all the products liability cases nationwide over the 25 years from 1965 to 1990,

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[10] See note 6, *infra* and accompanying text.

punitive damages were awarded in only 355 cases; of those cases, 95 (27%) involved asbestos. The researchers located seven awards from 1965 through 1970 (none for asbestos) and seventeen awards from 1971 through 1975 (again, none for asbestos). Between 1976 and 1980, awards increased to forty-one (including the first two awards of punitive damages in asbestos cases), and increased again between 1981 and 1985 to 139 (including 20 awards in asbestos cases). Finally, between 1986 and 1990, the total number of awards increased to 151 cases (including 73 asbestos cases). 78 Iowa L. Rev. at 38-45.

(B) The Number of Non-Asbestos-Related Punitive Damages Declined from 1986 to 1990 -- Although the data reveal an absolute increase in the number of punitive damages awards during the entire period studied, the same data also demonstrate a highly significant countervailing trend: both an absolute and a relative decline in the number of non-asbestos-related cases from the penultimate five-year period to the final five-year period (dropping from 119 to 78 -- a *decrease* of 65%). Put differently, *once asbestos-related cases are controlled for, the number of punitive damages awards in products liability cases actually declined from 1986 to 1990.* 78 Iowa L. Rev. at 38-45.

(C) Punitive Damages Awards Are Not "Skyrocketing" in Size and Are More Than Double the Size of Compensatory Damages Awards in Less Than Half the Cases -- As stated earlier, punitive damages awards occur much less frequently than is generally believed. Punitive damages awards are also much smaller in size than is generally believed. To be sure, awards of punitive damages exceeded awards of compensatory damages in 208 (59%) of the cases reported in the Rustad-Koenig Study. Moreover, in 38% of the cases reported, punitive damages were more than twice the amount of compensatory damages. On the other hand, however, compensatory damages exceeded punitive damages in 35% of the cases and were more than twice the size of the punitive awards in 23% of the cases. 78 Iowa L. Rev. at 45-51.

The median compensatory damage award for the 355 cases found was $500,100. The median punitive damages award for the 355 cases was $625,000, *i.e.*, only 25% higher than the median compensatory award. Both figures are fully consistent with those depicted in the RAND-ICJ Study. Rustad-Koenig at 29. When adjusted for inflation, this punitive damages award median is quite similar to the RAND-ICJ figures. That study found that a number of extremely large awards raised the average and accounted for a majority of total amounts awarded. The RAND-ICJ median for the total award, including both compensatory and punitive damages, is $1,457,600. One-fourth of these total awards were $500,000 or less. When inflation was controlled for (through the use of constant 1983 dollars), the median punitive damages award was $688,500, as compared with $516,000 in compensatory damages. *Id.*

In sum, the five empirical studies are unanimous in their findings: contrary to popular myth, and the arguments of Honda and its amici, punitive damages are not awarded frequently, they are neither excessively large in size nor disproportionate to compensatory damages awards, and they not skyrocketing in frequency, size, or proportion.

III. JURIES CAN BE TRUSTED TO MAKE COMPETENT, FAIR, AND UNBIASED DECISIONS.

Honda and its *amici* variously assert that juries cannot and should not be trusted to make important decisions, such as setting the size of punitive damages awards, because lay jurors are either incompetent or biased or both. Thus, petitioners, which put great stock in the good judgment of "lay men and women," Pet. Br. at 9, when it comes time for them to purchase automobiles, nonetheless opine that:

> *It is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray* by bias, by naked redistributionist impulses, by a misunderstanding of the law, or by many other influences or deficiencies that

> should be unacceptable in our system of justice. These concerns are compounded where punitive damages are at issue, for the setting of an appropriate penalty is wholly outside the experience of lay men and women.

Id. (emphasis added). Moreover, says Honda, "it is doubtful that any jury charge, no matter how detailed, could obviate the need for judicial excessiveness review. ***The empirical evidence is overwhelming that juries often do not understand instructions, and even a jury that does grasp the judge's charge may fall subject to passion, bias, arbitrariness, or simple misjudgment.***" *Id.* at 10 (emphasis added).[11]

Curiously, though, 12 pages further into its brief, when it comes time for Honda to identify the "overwhelming"

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[11] Not surprisingly, Honda's *amici* share its disdain for the jury. *See, e.g.*, ACLI Br. at 8 ("it is widely recognized, and has often been noted by this Court, that when awarding punitive damages, juries sometimes make those awards under the influence of passion and prejudice."); *id.* at 11 ("even the most fair and impartial jury lacks the proper framework for determining what amount of punitive damages will best accomplish the goals of punishment and deterrence. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions."); Brief *Amicus Curiae* of the Washington Legal Foundation ("WLF Br."):

> Jurors are not likely to comprehend the myriad adjustments to financial data necessary to fairly and accurately assess a corporation's financial status. Moreover, the fact that a corporation's wealth may be valued in the millions, if not billions, of dollars adds to the risk that the sensibilities of jurors may be overwhelmed by such enormous sums of money. Consequently, evidence of extremely large dollar figures, combined with sophisticated financial arguments, "may all begin to blur in the minds of many jurors." As a practical matter, jurors may thus become receptive to the simplest argument available – that punitive damages should be based on an arbitrarily selected percentage of defendant's "wealth."

WLF Br. at 21 (citation omitted).

"empirical evidence" of juror ineptitude, Honda lowers its voice and modulates its tone:

> While a whole constellation of considerations leads judges to arrive (by and large) at well-reasoned and objectively "correct" decisions, . . . [s]tudents of the jury . . . have found that juries *sometimes* "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to consider, and consider[] extralegal factors in determining liability and punitive awards." . . . *More generally, it seems clear* from the work of social scientists that *juries "are occasionally biased* against corporate defendants."

Pet. Br. at 22-23 (emphasis added; citing a 1985 study, a 1987 study, and two studies from 1989).

A review of the more recent empirical studies on jury decisionmaking helps to explain why Honda turned down its rhetoric so suddenly. Not only is the empirical evidence proving jury incompetence and bias not "overwhelming," that evidence is highly controverted. Indeed, the most recent studies about juries reveal that their decisions are as reliable and accurate as those of judges and that if jurors are biased at all, they are biased *against* tort plaintiffs and *in favor of* corporate defendants.

For example, on the question of bias, a 1992 study reported that,

> [r]ather than revealing jurors willing and eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. [Moreover,] [d]espite insistence on product safety and high expectations of business, jurors were *[A]* generally favorable toward business, *[B]* skeptical more about the profit motives of

> individual plaintiffs than of business defendants, and *[C]* committed to holding down awards.

Valerie P. Hans and William F. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate* (University of Delaware, May, 1992), at 11 (reprinted in 26 L. & Soc. Rev. 85 (1992)).

Generally, "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits." *Id.* Specifically:

- "83% of the tort jurors sampled either agreed or strongly agreed with the statement that '[t]here are far too many frivolous lawsuits,'" *id.* at 41, Table 1;
- "81% agreed or strongly agreed with the proposition that '[p]eople are too quick to sue . . .,'" *id.*;
- "39% agreed or strongly agreed with the assertion that '[t]he money awards that juries are awarding in civil cases are too large,'" *id.*; and
- "32% agreed or strongly agreed that '[t]he number of lawsuits show that our society is breaking down.'" *id.*

On the other hand, "[c]ontrary to the skepticism shown plaintiffs, corporate defendants were typically not subjected to such vigorous scrutiny," *id.*; there was "little evidence of tough standards and punitiveness [by jurors] toward[s] . . . corporation[s] . . . ," *id.*, at 18; most jurors evinced only "scattered concern about the profit motive causing business to cut corners," *id.* at 23; most jurors thought that an "organization's assets should not be and were not relevant to the liability and award decisions," *id.* at 26; and jurors' "comments derogating business were rare compared to the more frequent negative evaluations of the plaintiffs and their [putatively] mercenary motives." *id.* at 24.

These conclusions are borne out by additional findings:

- 57% of the tort jurors sampled agreed or strongly agreed with the statement that "[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products";
- 51% agreed or strongly agreed with the view that "[b]ig business . . . is adequately concerned with the safety of its workers"; and
- 32% agreed or strongly agreed with the notion that "[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive."

Id. at 42-43.

The survey results published by Profs. Hans and Lofquist are consistent with a recent study of the outcomes of 90,000 personal injury cases. As described last month in the *Wall Street Journal*:

> Juries in personal-injury cases appear to have had a significant change in heart: In recent years, they have been rejecting injury claims more often.
>
> According to a study of more than 90,000 cases by Jury Verdict Research, a court-watching group, juries in 1992 sided with alleged personal injury victims in about 52% of suits that went to trial, down from 61% in 1987 [*i.e.*, a 15% relative decline]. Over the same period, plaintiffs' chance of winning product-liability suits declined to 43% from 54% [*i.e.*, a relative drop of 20%]. In cases against consumer-products manufacturers, the drop was even sharper: consumers won about 39% of these cases in 1992, down from 55% in 1987 [*i.e.*, a relative decline of 29%.].
>
> Jury specialists say the powerful and deep-pocketed advocates of reform have spread their message so successfully in the media that juries have changed their behavior. "The

> publicity of the business and insurance groups has played a major role in shifting both public and judge opinion," says Theodore Eisenberg, a professor at Cornell Law School. "Either there was a liability crisis or people got sold one, and attitudes changed in a way that led to more victories for defendants."

Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, *Wall St. J.*, March 21, 1994 at B1.[12]

Similarly, on the question of juror competence in setting awards in comparison with the abilities of judges to do the same, not only are Honda's charges not supported by any empirical research, those charges are refuted by such research. *See, e.g.*, Neil Vidmar and Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883, 896 (1993) (data collected and analyzed in course of comprehensive empirical study comparing decision-making by jurors and judges "lend no support to the widely-held view that jurors are more generous

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[12] *See* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. Rev. 731, 770 (1992) (reporting that "from 1985 to the time of the most recently available data, the products battle has been a slaughter. Filings began to plummet; success rates continued to fall. Most measures of awards - means, expected returns, and sums - are down. Medians are equivocal." For example, "plaintiff success rates in published opinions fell from 56% in 1979 to 39% in 1989, a drop of 29%. At the federal district court level ... plaintiff success rates fell from 41% in 1979 to 31% in 1989, a drop of 24%." *id.* at 741. *See also Quayle's View on Liability Suits Is Widely Held, Poll Shows*, Wall St. J., Feb. 19, 1992, at B10; Sean F. Mooney, *Crisis and Recovery: A Review of Business Liability Insurance in the 1980s*, Insurance Information Institute, May 1992, at 19 ("A 1992 survey shows that 44 percent of the public believes only about half of the plaintiffs in [civil liability] suits have just cause to file suit."); Edith Greene, Jane Goodman, and Elizabeth F. Loftus, *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 Am. U. L. Rev. 805, 814 (1991) (90% of jurors polled "agreed that there are too many lawsuits."); Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?* 18 St. Mary's L.J. 797, 824-25 (1987).

than judges and arbitrators in awarding noneconomic damages. Moreover, the data do not support the view that the reasoning of laypersons in calculating the award is substantially different from that of legally trained persons."); Kevin M. Clermont and Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Corn. L. Rev. 1124 (1992) (revealing that judges are more pro-plaintiff than jurors; in personal injury cases, plaintiffs win 50% of all bench trials, while winning in only 29% of the cases tried to a jury); and Vidmar & Rice, *supra*, 78 Iowa L. Rev. at 901 ("*our findings . . . offer a significant challenge to the argument that legal professionals are more capable and consistent than juries in awarding noneconomic damages.*" (emphasis added)).

Finally, Honda's deprecations against the jury run counter to the consensus views of more than 100 participants who attended a 1992 symposium on the future of the civil jury system, which was jointly sponsored by the American Bar Association and the Brookings Institution. "The participants represented a broad cross-section of users of the legal system, its practitioners, its judges, and the academic scholars who study it." *Charting a Future for the Civil Jury System* (1992) at vii.[13]

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[13] The participants included REPRESENTATIVES OF VARIOUS OF HONDA'S *AMICI*, and CORPORATE MEMBERS OF THOSE *amici* (*e.g., the Alliance of American Insurers; National Association of Independent Insurers; Aetna Life & Casualty; State Farm Insurance; Travelers Insurance Co.; Monsanto; General Electric; Ford Motor Co.; and Chevron*), COUNSEL TO THOSE *AMICI* OR THEIR CONSTITUENT CORPORATE SPONSORS (*e.g., Mayer, Brown & Plan; Kirkland & Ellis; Venable, Vartjer, Howard & Civiletti; Foley & Lardner; Patton, Boggs & Blow; Crowell & Moring; and Jenner & Block*), REPRESENTATIVES OF GOVERNMENT AGENCIES AND PRIVATE THINK TANKS (*e.g., U.S. Department of Justice; Federal Judicial Center; National Jury Project; American Bar Foundation; U.S. Sentencing Commission; RAND-Institute for Civil Justice; National Center for State Courts; State Justice Institute; and American Judicature Society*), DISTINGUISHED MEMBERS OF THE LOWER FEDERAL COURTS (*e.g., Hon. Kenneth W. Starr; Hon. Marvin E. Aspen; Hon. Jim R. Carrigan; Hon. H. Lee Sarokin; Hon. Joseph F. Weis, Jr.; and Hon. William G. Young*), AND CELEBRATED LEGAL SCHOLARS (*e.g., Prof. George Priest of Yale Law School, Dean Peter Schuck of Yale Law School, Prof. Marc Galanter of the University of Wisconsin Law School, Prof.*

The extensive findings of the symposium participants regarding the role and strength of the jury system, the attitudes and skills that jurors bring to their tasks, the consistency and defensibility of the verdicts and awards that jurors make, and various demands to limit the discretion and responsibilities of juries are quite apposite.[14] Most pertinently, the report stated:

Barbara Allen Babcock of Stanford Law School, and Prof. Stephen Saltzburg of National Law Center - The George Washington University).

[14] The key findings and conclusions of the ABA/Brookings Institution Symposium on the Civil Jury System included:

> ***First***, the jury is a valuable process for decisionmaking and an effective means for arriving at a fair resolution of disputed facts. ***The evidence indicates the jurors take their responsibilities very seriously and attempt to reach fair and just results. Moreover, there is no evidence that judges or any other decisionmaker systematically would produce any more consistent or defensible set of results in similar circumstances than juries.*** Indeed, it is our collective experience, backed by the available empirical evidence, that the rate of agreement between judges and juries is generally high. As one participant observed, the amateurism and transience of the jury are its virtues not its vices. *Civil Jury System* at 8 (emphasis added).
>
> ***Second***, *the jury provides important protections against the abuse of power by legislatures, judges, the government, business or other powerful entities.* In the words of Chief Justice William Rehnquist, "the founders of our Nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Id.* at 9 (emphasis added).
>
> ***Third***, the jury brings broadly based community values to dispute resolution. . . . We believe *juries provide the best mechanism for bringing broadly based community values to bear on the issues* involved in private disputes but [sic] doing so with their public function in mind. It is in the courtroom that the community's sense

A commonly voiced concern about juries is that precisely because they consist of randomly chosen individuals their decisions can have a certain "random" component. As a result, it has been claimed, a number of different juries hearing the same case, even when drawn from the same local population, may produce a substantial variation in results.

> of fairness, of justice, of right and wrong is expressed. It is here that the conflict between the regulation of society and its impact on organizations and individuals gets adjusted and integrated, and where competing values are balanced. *Id.* (emphasis added). . . .
>
> ***Fourth***, *the jury provides an important check on the bureaucratization and professionalization of the legal system. The involvement of jurors prevents adjudication from becoming technical and routinized, perhaps even distant and insensitive, as cases with similar fact patterns recur over and over before the same decisionmaker (the judge).* ***The jury brings common sense and fairness to its decisions,*** cutting through the arcane and often overly detailed presentation of information by lawyers and judges. *Id.* at 10 (emphasis added). . . .
>
> ***Finally***, *the jury system provides a means for legitimizing the outcome of dispute resolution and facilitating public understanding and support for and confidence in our legal system.* Law is the glue that helps hold society together. In a democratic society, confidence in the legal system is therefore essential. *Id.* (emphasis added).

Accordingly, the symposium participants' ultimately concluded that:

> *the civil jury system is valuable and works well. Most of the participants do not believe it is "broken," and therefore it need not be "fixed." The jury system is a proven, effective, and important means of resolving civil disputes. Accordingly, there was strong sentiment among symposium participants to resist efforts to reduce the jury's role:* indeed, some participants urged that the range of matters submitted for jury decisionmaking be expanded. *Id.* at 2-3 (emphasis added).

> *This same argument can and should be applied to judges or any other single decision maker as well. Indeed, all individuals can have biases that can distort outcomes. At least with juries there is an attempt during voir dire to eliminate potential jurors with obvious biases from serving as decisionmakers. In addition, any remaining biases of individual jurors often are canceled out in the jury as a whole.*

Id. at 26. For this reason, symposium participants carefully considered, and "strongly rejected," various proposals to make "jury outcomes . . . less random," such as by "reduc[ing] juror discretion." *Id.* Accordingly,

> with few dissents, the participants opposed statutory changes that would provide schedules for ranges of non-economic damage (generally for pain and suffering) that juries would be permitted to award to plaintiffs of certain ages and with particular injuries. As several participants stated while at the symposium, "the past should not determine the future" when it comes to damage awards. ***Jurors instead should be free to bring their own standards for what is just compensation to each case without being limited in any fashion.*** For similar reasons, a majority of participants would not allow jurors to be informed of damage awards in similar cases in other jurisdictions, although some participants favor this in the hope of narrowing the range of such awards.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

DATE: March 31, 1994

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APPENDIX A

1. *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808 (8th Cir. 1992) (discussed in text)

2. *Ingram v. Acands, Inc.*, 977 F.2d 1332 (9th Cir. 1992) (sufficiency of the evidence, not excessiveness of the award was at issue)

3. *Hafner v. Brown*, 983 F.2d 570 (4th Cir. 1992) (discussed in text)

4. *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (discussed in text)

5. *Loughman v. Consol-Pa. Coal*, 6 F.3d 88 (3d Cir 1993) (discussed in text)

6. *Mitchell v. Globe International Publishing*, 817 F. Supp. 72 (W.D. Ark. 1993) (punitive damages were not at issue; only compensatory damages were remitted)

7. *Hebron Public School Dist. No. 13 v. U.S. Gypsum*, 953 F.2d 398 (8th Cir. 1992) (sufficiency, not excessiveness, was at issue)

8. *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992) (sufficiency, not excessiveness, was at issue)

9. *In re Hawaii Federal Asbestos Cases*, 960 F.2d 152 (9th Cir. 1992) (sufficiency, not excessiveness, was at issue)

10. *Bergeson v. Dilworth*, 959 F.2d 245 (10th Cir. 1992) (excessiveness was not at issue)

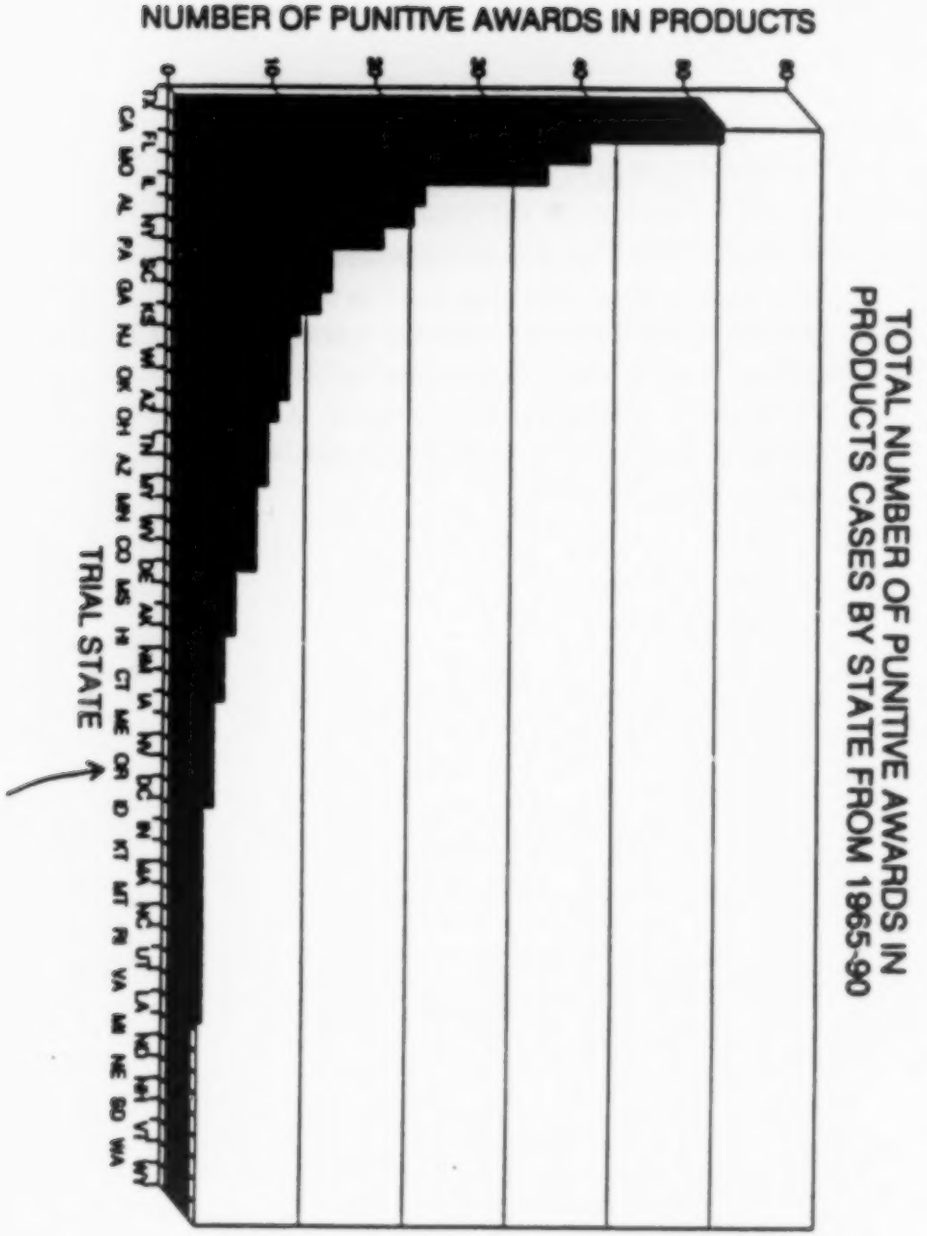
11. *Barwell v. Barber-Colman Co.*, 953 F.2d 637 (4th Cir. 1992) (award struck on ground that punitive damages are not allowed in strict liability case under South Carolina law; excessiveness was not at issue)

12. *Fenstermacher v. Telecast*, 1992 WL 175114 (D. Kan. 1992) (remittitur impossible as a matter of law because Kansas juries can only recommend that punitive damages should be awarded; court fixes the size of the award)

13. *Maharis v. Omaha Vaccine Co.*, 967 F.2d 588 (9th Cir. 1992) (sufficiency, not excessiveness, was at issue)

APPENDIX B

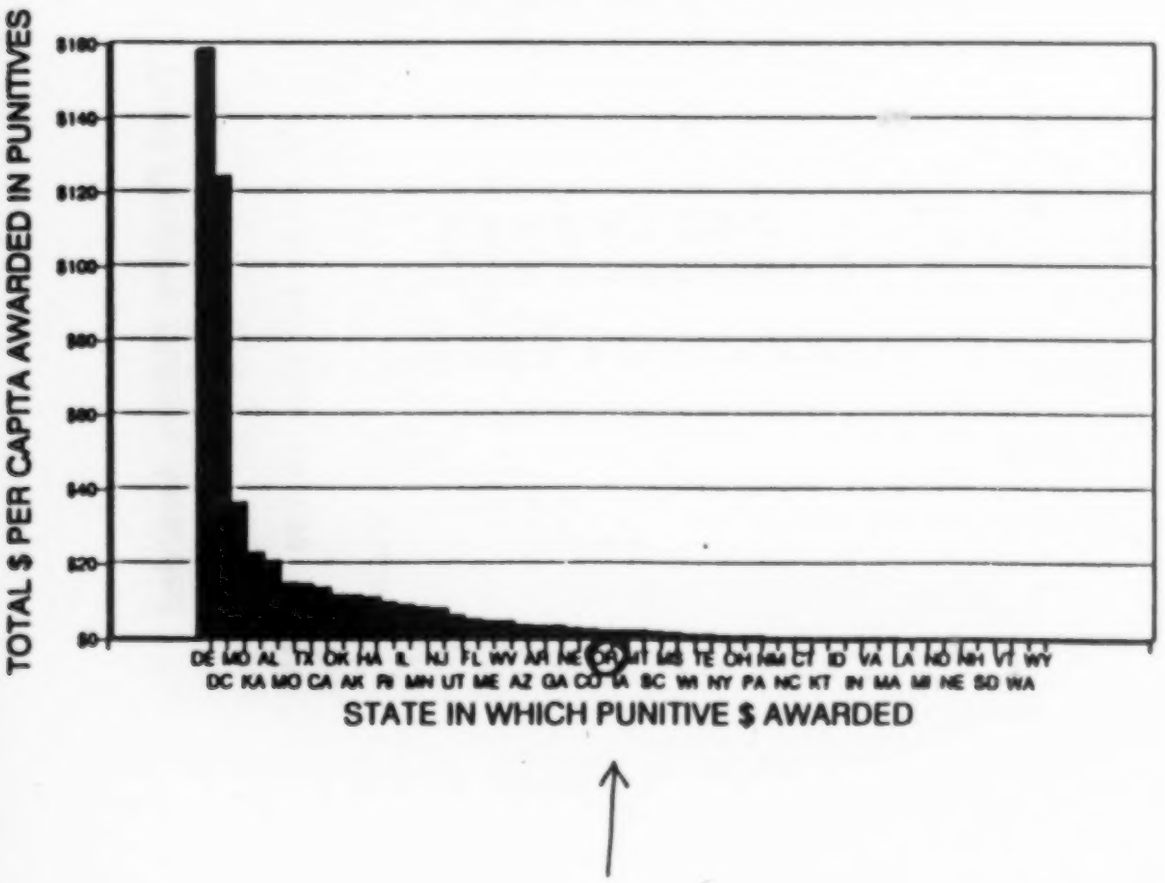
NOTE: The following tables and graphs were derived from data contained in the database that was formed for the research monograph by Michael Rustad and Thomas Koenig, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992).


NUMBER OF PUNITIVE AWARDS IN PRODUCTS
TOTAL NUMBER OF PUNITIVE AWARDS IN PRODUCTS CASES BY STATE FROM 1965-90
TRIAL STATE

Total Number of Punitive Damages Awards in Products Liability Cases (1965-90)

State	Number	Rank
TX	51	1
CA	38	2
FL	34	3
MO	22	4
IL	21	5
AL	18	6
NY	13	7
PA	13	8
SC	12	9
GA	10	10
KS	9	11
NJ	9	12
WI	9	13
OK	8	14
AZ	7	15
OH	7	16
TN	7	17
AZ	6	18
MD	6	19
MN	6	20
WV	6	21
CO	4	22
DE	4	23
MS	4	24
AK	3	25
HI	3	26
NM	3	27
CT	2	28
IA	2	29
ME	2	30
NV	2	31

ALL PRODUCT LIABILITY PUNITIVE DAMAGE $ DIVIDED BY POPULATION OF STATE 1965-90


TOTAL $ PER CAPITA AWARDED IN PUNITIVES
$160
$140
$120
$100
$80
$60
$40
$20
$0
DE MD AL TX OK HA IL NJ FL WV AR NE OR UT MS TE OH MM CT ID VA LA ND NH VT WY
DC KA MO CA AK PI MN UT ME AZ GA CO IA SC WI NY PA NC KT IN MA MI NE SD WA
STATE IN WHICH PUNITIVE $ AWARDED

2 3 3 3 5 5 7 8 9 9 4 4 4 4 4 4 4 4 4 4 9 9 5

2 1 1 1 1 1 1 1 1 1 0 0 0 0 0 0 0 0 0 0

OR
DC
ID
IN
KY
MA
MT
NC
RI
UT
VA
LA
MI
ND
NE
NH
SD
VT
WA
WY

Total Punitive Dollars Awarded in Products Liability Cases

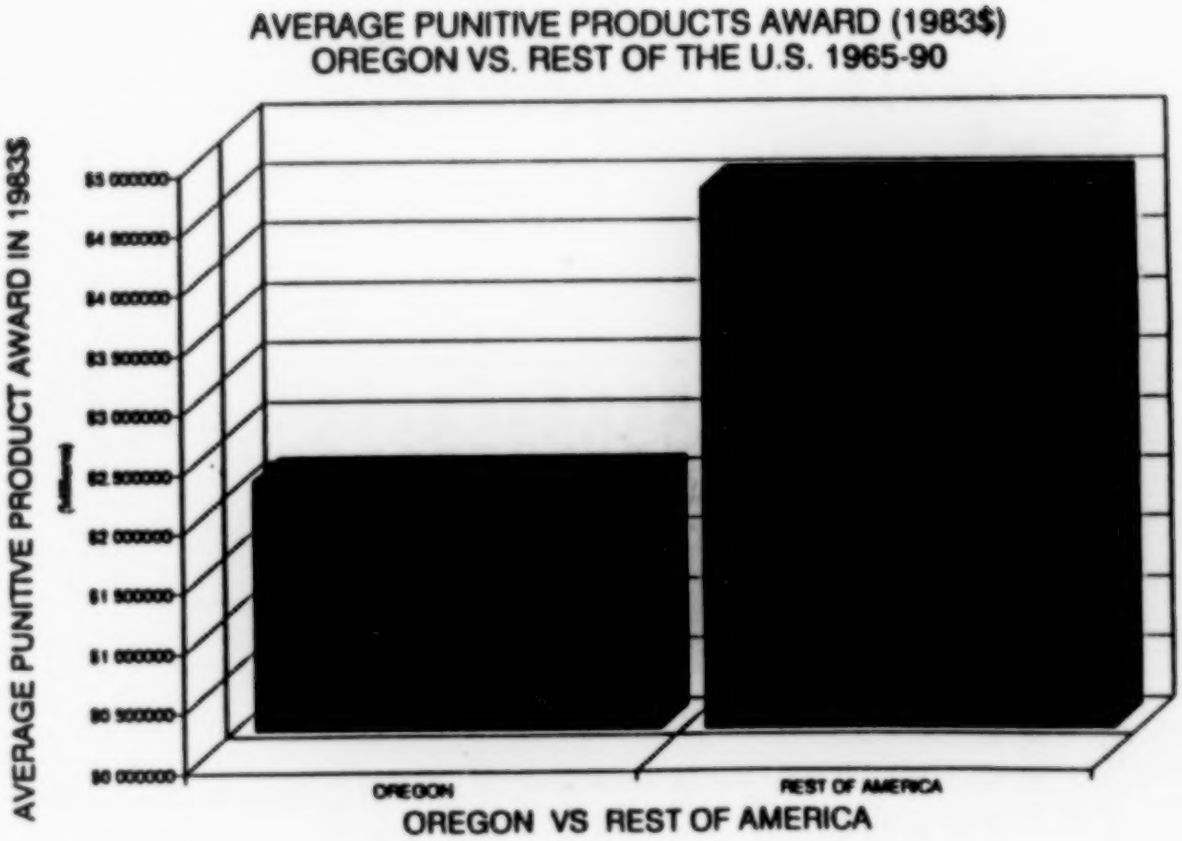
Per Capita Per State, 1965-90

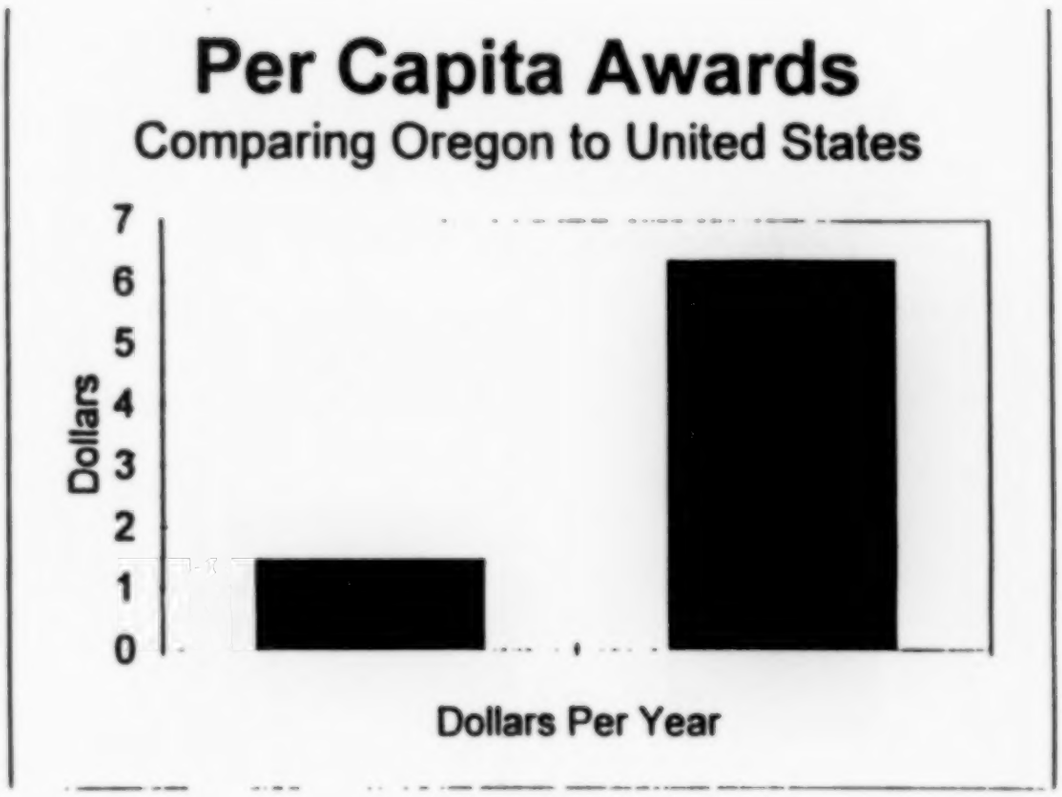
State	$ Per Capita	
DE	158.2	1
DC	124.17	2
MD	36.34	3
KS	22.62	4
AL	20.42	5
MO	14.76	6
TX	14.37	7
CA	13.28	8
OK	11.58	9
AK	11.4	10
HI	10.81	11
RI	9.61	12
IL	8.97	13
MN	8.07	14
NJ	7.79	15
UT	5.95	16
FL	5.15	17
ME	4.32	18
WV	4.25	19
AZ	3.38	20
AR	2.96	21
GA	2.92	22
NE	2.52	23
CO	2.25	24
OR	2.84	25
IA	1.82	26
MT	1.7	27
SC	1.32	28
MS	1.21	29
WI	0.83	30
TN	0.75	31
NY	0.64	32
OH	0.62	33
PA	0.49	34
NM	0.28	35
NC	0.23	36
CT	0.21	37
KY	0.13	38
ID	0.01	39
IN	0.09	40
VA	0.04	41
MA	0.01	42
LA	0	43
MI	0	44
ND	0	45
NE	0	46
NH	0	47
SD	0	48
VT	0	49
WA	0	50
WY	0	51

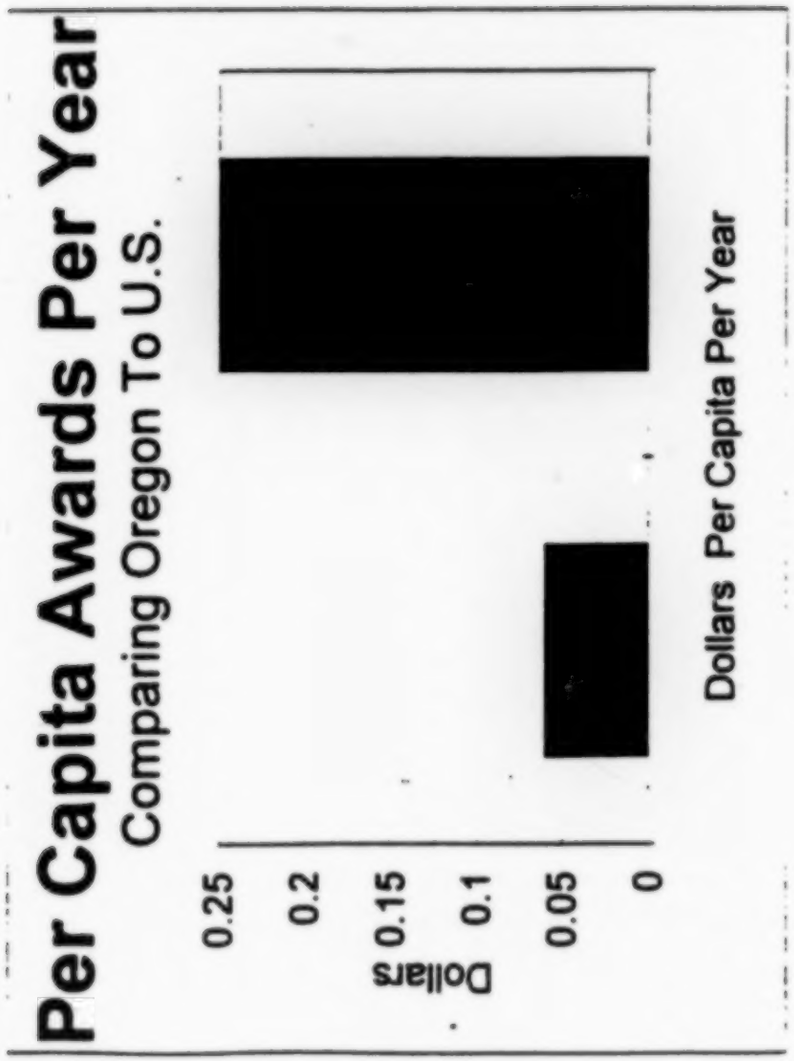
Punitive Damages Awarded Per Year

Total Punitive Damges Awarded, 1965-90
Inflation Adjusted 1983 Dollar, Divided by 25

State	Punitive $	Rank
CA	11,769,881	1
TX	8,980,378	2
IL	5,512,721	3
MD	4,226,379	4
DE	3,570,800	5
AL	2,727,520	6
DC	2,665,589	7
MO	2,631,000	8
FL	2,399,866	9
NJ	2,248,486	10
KS	1,925,417	11
OK	1,548,076	12
WI	1,511,512	13
MN	1,291,040	14
GA	667,931	15
NY	467,515	16
AZ	413,951	17
HI	401,301	18
UT	350,800	19
AR	303,000	20
RI	292,880	21
CO	248,150	22
AK	276,729	23
WV	267,876	24
OH	265,144	25
PA	226,506	26
SC	190,674	27
ME	188,832	28
TN	168,674	29
OR	166,880	30
IA	154,000	31
MS	117,426	32
NV	93,410	33
MT	53,648	34
NC	48,240	35
IN	30,580	36
CT	22,601	37
KY	18,500	38
ID	12,000	39
NM	12,817	40
VA	9,580	41
MA	1,520	42
LA	0	43
MI	0	44
ND	0	45
NE	0	46
NH	0	47
SD	0	48
VT	0	49
WA	0	50
WY	0	51


AVERAGE PUNITIVE PRODUCTS AWARD (1983$)
OREGON VS. REST OF THE U.S. 1965-90
AVERAGE PUNITIVE PRODUCT AWARD IN 1983$
OREGON
REST OF AMERICA
OREGON VS REST OF AMERICA


Per Capita Awards
Comparing Oregon to United States
Dollars
7
6
5
4
3
2
1
0
Dollars Per Year



Average Punitive Damages Awards in Products Liability Cases, 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$2,086,000
Rest of United States	$4,522,991

Average Punitive Damages Awards, Per Capita in Products Liability Cases, 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$ 2,842
Rest of United State.	$245,868

Total Number of Punitive Damages Awarded in Products Liability Cases, 1965-90

Oregon	$4,172,000
Rest of United States	$1,564,776,159

Average Punitive Damages Award in Products Liability Cases 1965-90 (measured in inflation adjusted 1983 $)

Oregon	$2,086,000
Rest of United States	$4,522,991

Per Capita Punitive Damages Awards For the 1965-90 Period and Per Capta Per Year (in parentheses)

Oregon	$1.47	($0.06)
Rest of the United States	$6.36	($0.25)